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ONG HONG DEVELOPMENT SDN BHD

v.

GREAT BUDGET SDN BHD

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HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[SUIT NO: 22-12-2004-III(II)]
15 SEPTEMBER 2008

C ***CONTRACT:*** *Agreement - Variation of - Whether incorporated into a supplementary agreement - Whether there was a concluded supplementary contract - Whether agreement between plaintiff and defendant properly terminated - Oral agreement - Whether inadmissible - Evidence Act 1950, s. 92*

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The defendant was developing a parcel of land at Simunjan (the project) in which Sublot 10 was part and parcel of the project. The plaintiff herein purchased Sublot 10 from the defendant for the consideration of RM260,000. On signing of the agreement, the plaintiff paid a sum of RM80,000 to the defendant by way of a transfer of one unit of excavator to the defendant. On 30 June 2001 and 18 July 2001, the defendant's solicitor sent a notice to the plaintiff to request a payment of RM50,000 as part of the purchase price. Pursuant to those notices, the director for the plaintiff, one Mr Tang and one Yu Hieng Chew (PW1) went to see one Hu Kii Hing (DW1) a director of the defendant to resolve the payment of the said RM50,000. The plaintiff's version of the events were that DW1 had requested Mr Tang to withhold the payment of RM50,000 because the defendant wanted the plaintiff to exchange the Sublot 10 with another shophouse as the defendant had found a purchaser for Sublot 10. As far as the plaintiff was concerned, the agreement between the parties after several discussions were (i) the purchase price of Sublot 3 shall be RM220,000; (ii) the sum of RM80,000 paid in respect of Sublot 10 shall be treated as part payment of the purchase price of Sublot 3; (iii) the balance of the purchase price shall only be paid upon full completion of Sublot 3; (iv) a supplementary agreement was to be executed between the parties in order to incorporate all the additional terms and conditions as agreed between both the plaintiff and the defendant. On 29 July 2002, the plaintiff wrote to the defendant to inform that in view of its failure to adhere to the terms in drafting the supplementary agreement, the plaintiff was now claiming beneficial ownership to

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Sublot 10. In reply, the defendant said that Sublot 10 had been disposed off with the knowledge and consent of the plaintiff. According to the defendant, to assist the plaintiff who had difficulty in securing a loan to pay for the balance of the purchase price of Sublot 10 the defendant had proposed that the plaintiff exchanged Sublot 10 with Sublot 3 which was an intermediate lot and a cheaper unit. According to DW1, the above terms had been agreed to by the plaintiff and based on that agreement the defendant sold Sublot 10 to one Kii Heng Ching. The issues that arose were (1) was the agreement between the plaintiff and the defendant properly terminated; (2) was there a concluded supplementary agreement between the defendant and the plaintiff.

Held:

(1) The defendant's version of the events was premised on an oral agreement reached between the parties. For the court to enforce this oral agreement, it must overcome s. 92 of the Evidence Act which provides, as a general rule, oral evidence is inadmissible as between the plaintiff and the defendant to contradict, vary, add to, or subtract from the terms of the agreement which concerned the sale and purchase of Sublot 10. Any variation of that basic term must be implemented by way of a variation or supplementary agreement. No such agreement was before this court. (para 12)

(2) The supplementary agreement did not reflect what the defendant itself contended in evidence. Firstly, it was undisputed that Sublot 3 was a cheaper shophouse than Sublot 10, but this was not reflected in the supplementary agreement. Secondly, it was also the evidence of the defendant that a sum of RM42,000 being the electrical sub-contract would be treated as part payment for Sublot 3. Again this was not incorporated in the supplementary agreement. DW1's testimony on this matter was one of ignorance. (para 12)

(3) The omissions in the supplementary agreement clearly showed that there had not been any meeting of minds by the plaintiff and the defendant in respect of the swapping of Sublot 10 for Sublot 3. It may well be that the plaintiff had agreed to the proposal to swap Sublot 10 to Sublot 3 but that the agreement was subject to terms agreeable to both parties. Even if there were meeting of minds, the terms had not been incorporated in the Supplementary Agreement, the

consequence of which was that the agreement remained binding on the plaintiff and the defendant. Further, there was no letter of termination by the defendant in respect of the agreement. (para 12)

(4) Sublot 10 had been sold to a third party and since there was no evidence to the contrary, the third party was a *bona fide* purchaser without notice. This fact deprived the plaintiff's claims for specific performance of the agreement as prayed for in the statement of claim. This court thus declared that the agreement be rescinded and ordered the defendant to pay the plaintiff the sum of RM80,000 with interest at the rate of 8% per annum from the date of judgment till full payment of the judgment sum with costs to be taxed unless agreed to the plaintiff. (para 13)

[Order accordingly.]

Case(s) referred to:
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92

For the plaintiff - Tony Hii Yii Yik; M/s Stephen Robert & Wong Advocates
For the defendant - Wong Sing Nang; M/s Wong, Orlando Chua & Kuok Advocates

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Proceedings

[1] The plaintiff claims for the following:

(1) A declaration that the plaintiff has both the legal and beneficial rights on the said Sublot 10;

(2) A declaration that the agreement dated 22 December 2000 (the agreement) entered into between the plaintiff and the defendant for the purchase of 1 unit of 2-storey concrete corner shophouse known as Sublot 10 (now known as Lot 270) (Sublot 10) is still subsisting;

(3) The sales and the transfer of the said Sublot 10 to Kii Heng Ching and Klinik Lau & Lau (2003) Sdn Bhd be set aside;

(4) A declaration that the sale and purchase agreement dated 3 October 2001 and the Memorandum of Transfer No. L. 4340/ 2007 is invalid, null and void; and

(5) Alternatively, rescission of the said agreement and repayment to the plaintiff the sum of RM80,000 paid thereunder with interest at 8% per annum from date of judgment until full and final payment.

[2] The claims are premised on the validity of the agreement.

[3] The claims are refuted by the defendant on the alleged ground that the agreement had been superseded by a supplementary agreement which the plaintiff had breached resulting in the termination of the supplementary agreement by the defendant.

Background

[4] By virtue of the agreement, the plaintiff purchased the Sublot 10 from the defendant for the consideration of RM260,000. On signing of the agreement, the plaintiff paid a sum of RM80,000 to the defendant by way of a transfer of one unit of excavator to the defendant. The defendant was at that time developing a parcel of land at Simunjan (the project) in which Sublot 10 was part and parcel of the project.

[5] On 30 June 2001 and 18 July 2001 the defendant's solicitor sent a notice to the plaintiff to request a payment of RM50,000 as part of the purchase price. Pursuant to those notices, one Mr. Tang Lung Kiew (Mr. Tang), a director of the plaintiff and Mr. Yu Hieng Chew (PW1) went to see Mr. Hu Kii Hing (DW1), a director of the defendant to resolve the payment of the RM50,000. Mr. Tang has, since 2002, been paralyzed and did not testify in court. PW1 is the son in law of Mr. Tang.

[6] What transpired at that meeting and subsequent meetings between the parties are the subject of dispute and the court is faced with two versions of the events.

A **The Plaintiff's Version**

[7] At the first meeting it is alleged that DW1 had requested Mr. Tang to withhold the payment of the RM50,000 because the defendant wanted the plaintiff to exchange the Sublot 10 with another shophouse, namely Sublot 3 (which was an intermediate lot bearing a lower purchase price) as the defendant had found a potential purchaser for Sublot 10. The reason for the request was that the defendant had found a purchaser who was interested in Sublot 10 and the adjoining shophouse and needed the cash urgently to continue the project. After several discussions, as far as the plaintiff was concerned, the agreement between the parties were as follows:

(i) The purchase price of Sublot 3 shall be RM220,000;

(ii) The sum of RM80,000 paid in respect of Sublot 10 shall be treated as part payment of the purchase price of Sublot 3 and part of the remaining purchase price shall be paid by way of set-off in the form of electrical works which sum shall be ascertained between all the parties at a specified date;

(iii) The balance of the purchase price shall only be paid upon full completion of Sublot 3; and

(iv) A supplementary agreement is to be executed between the parties in order to incorporate all the additional terms and conditions as agreed between both the plaintiff and the defendant.

[8] According to the plaintiff, the supplementary agreement which was given to them by Messrs Michael Ong & Chang Advocates to sign did not contain the terms as had been agreed between the parties and hence it was not signed.

[9] On 29 July 2002 the plaintiffs solicitor, Messrs Yong & Wong, wrote to the defendant to inform that in view of its failure to adhere to the above terms in drafting the supplementary agreement the plaintiff is now claiming beneficial ownership to Sublot 10 and asked about the status of its construction. In reply to that letter the defendant's solicitor said that Sublot 10 had been disposed off with the knowledge and consent of the plaintiff.

Defendant's Version

[10] According to DW1, the plaintiff had difficulty in securing a loan to pay for the balance of the purchase price for the Sublot 10. To assist the plaintiff, the defendant proposed that the plaintiff exchange Sublot 10 with Sublot 3 which was an intermediate lot and a cheaper unit. Further, all payments made for Sublot 10 shall be treated as payment for Sublot 3 and the defendant will accept an assignment of electrical works worth RM42,000 from PW1 who was doing electrical works for the project. According to DW1, the above terms had been agreed to by the plaintiff and based on that agreement the defendant sold Sublet 10 to one Mr. Kii Heng Ching.

The Law

[11] In performing the task of determining which story is more credible, I take heed of what was stated in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 by Gopal Sri Ram JCA:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good, reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.
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> In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, the trial judge had found the plaintiff in that case guilty of fraudulent misrepresentation based on the veracity of the defendant and its witnesses. On appeal., the Federal Court reversed his finding of fraud. Chang Min Tat FJ said:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. **Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case**. Plausibility should never be mistaken for veracity, (emphasis added.)

In *Muniandy & Ors v. Public Prosecutor* [1966] 1 MLJ 257, the trial judge accepted the evidence of certain witnesses because they had remained unshaken in cross examination. Based on that evidence he convicted the appellant. The Federal Court reversed. Ong Hock Thye FJ said:

> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not *per se* an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam, and Ramasamy does not preclude closer scrutiny of their evidence and this we have done. (emphasis added.)

Findings Of The Court

[12] Having heard the evidence of the witnesses and read the submissions of counsels I find the evidence of the plaintiff to be more credible and my reasons are these:

1. The defendant's version of the events is premised on an oral agreement reached between the parties. For the court to enforce this oral agreement it must overcome s. 92 of the Evidence Act which provides, as a general rule, oral evidence is inadmissible as between the plaintiff and the defendant to

contradict, vary, add to, or subtract from the terms of the agreement which concerned the sale and purchase of Sublot 10. Any variation of that basic term must be implemented by way of a variation or supplementary agreement. No such agreement is before the court.

2. The supplementary agreement does not reflect what the defendant itself contends in evidence. Firstly it is undisputed that Sublot 3 is a cheaper shophouse than Sublot 10, but this is not reflected in the supplementary agreement. Secondly it is also the evidence of the defendant that a sum of RM42,000 being the electrical sub-contract would be treated as part payment for Sublot 3. Again this is not incorporated in the supplementary agreement. In fact as pointed by counsel for the plaintiff, DW1's testimony on this matter is one of ignorance.

3. The two omissions in the supplementary agreement clearly showed that there had not been any meeting of minds by the plaintiff and the defendant in respect of the swapping of Sublot 10 for Sublot 3. Furthermore the defendant's evidence gives credence to the plaintiff's contention that it wanted Messrs Michael Ong & Chang Advocates to change the Supplementary Agreement to incorporate the agreed conditions. It may well be that the plaintiff had agreed to the proposal to swap Sublot 10 for Sublot 3 but that agreement is subject to terms agreeable to both parties.

4. There is no letter of termination by the defendant in respect of the agreement. Counsel for the defendant however contends that the notice of termination came in the form of a letter dated 26 August 2002, which 1 have examined with care, and am of the view that it cannot be treated as a letter of termination for the simple reason, as I had earlier said, that there had not been any meeting of minds by the parties in respect of the swap. Even if there were meeting of minds, the terms had not been incorporated in the supplementary agreement, the consequence of which is that the agreement remains binding on the plaintiff and the defendant.

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Order Of The Court

[13] It is undisputed that Sublot 10 had been sold to a third party and since there is no evidence to the contrary, the third party is a *bona fide* purchaser without notice. This fact, in my
B view, deprives the plaintiff's claims for specific performance of the agreement as prayed for in prayers (3) and (4) of the statement of claim. As the plaintiff has an alternative claim in prayer (5), for reasons given above, I declare that the agreement be rescinded and order the defendant to pay the plaintiff the sum of RM80,000
C with interests at the rate of 8% per annum from the date of judgment till full payment of the judgment sum with costs to be taxed unless agreed to the plaintiff.

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